

BOARD OF ALIEN LABOR CERTIFICATION APPEALS  
800 K St., N.W.  
WASHINGTON, D.C. 20001-8002

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Date: December 21, 1998  
Case No: 98-INA-0132

In the Matter of:

CAMY PHARMACY, INC.  
Employer

On Behalf of:  
VYOMESH K. SHAH  
Alien

Appearance: Laurie Grossman, Esq.  
for the Employer and the Alien

Certifying Officer: Dolores Dehaan  
New York, New York

Before: Holmes, Vittone and Wood  
Administrative Law Judges

JOHN C. HOLMES  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of alien, Vyomesh K. Shah ("Alien") filed by Employer Camy Pharmacy, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, New York, N.Y. denied the applications, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely

affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

#### **STATEMENT OF THE CASE**

On May 16, 1995, the Employer filed applications for labor certification to enable the Alien to fill the position of Pharmacist Intern in the company's pharmacy.

The duties of the job offered were described as follows:

"Under close supervision, compound medications, following prescriptions."

Wages were \$23,021.00 per year. A college degree with major in pharmacy was required, and no experience in job offered. Other special requirements were: must have N.Y. State Pharmacy Intern Permit. Supervise no employees and report to President. Twenty-three applicants were referred by the State Employment Service. (AF-1-149)

On May 16, 1997, the CO issued a NOF denying certification, finding that Employer may have violated 20 C.F.R. 656.21(b)(6) and 656.20(c)(8) in that the job opportunity may not be clearly open to U.S. applicants who may be rejected only for lawful reasons. The CO accepted the reasons for rejection of 12 applicants, but not the other 11. In the case where no experience is set out, otherwise qualified applicants cannot be realistically rejected under ordinary circumstances. The CO did not accept Employer's contention that the 11 applicants were unable to answer basic questions in a test given. Corrective action was to submit rebuttal demonstrating these applicants were not ready, willing and able and/or available at the time of initial interview. (AF-149-151)

Employer, July 15, 1997, forwarded its rebuttal, stating that the contention of the CO is incorrect in concluding that U.S. applicants cannot be rejected where no experience has been required. Employer contended that the U.S. applicants were properly rejected since they lacked the ability to perform the core job duties. The testing administered by Employer was an appropriate means of determining applicants' ability to perform

the job duties.(AF-152-166)

On September 22, 1997, the CO issued a Final Determination denying certification based on Employer's failure to adequately respond to the NOF, since Employer did not demonstrate that the U.S. applicants were not ready, willing and/or available. "Since applicants who hold a Bachelor's Degree in Pharmacy and New York Pharmacy Intern Permit are safely presumed to have the level of knowledge required to perform in a job which requires no experience and in which individual will work under close supervision." (AF-167-168)

On September 30, 1997, Employer filed a request for review and reconsideration of Final Determination. (AF-169-189)

### DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

We find the CO was correct. While we are not willing to state that there would never be an exception to a general rule, the fact that an educational requirement and a licensing requirement in a profession or trade are required for a job opportunity with no actual experience required presents a *prima facie* case that any applicant that meets those requirements is qualified. It is the very education and testing, i.e. licensing, that are the requirements. To then choose between various applicants either through testing or interviews is an invitation to discriminate against U.S. applicants and flies in the face of the very purpose of labor certification. Here 11 applicants have specifically met the requirements of the job opportunity. The testing given by Employer does not direct itself toward acquired experience, and, therefore, must be considered discriminating. Questionnaires sent to U.S. applicants demonstrate a substantial number were willing and available to accept the job opportunity.

### ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES  
Administrative Law Judge